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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JOE HILLS,

Plaintiff and Appellant,

v.

DEPARTMENT OF GENERAL SERVICES et
al.,

Defendants and
Respondents.

C061216

(Super. Ct. No. 06AS01556)

Plaintiff Joe Hills, the former State Printer with defendant Department of General Services (DGS), lost his job and sued the State of California, DGS, and the Office of State Publishing for racial discrimination. Hills claimed his termination, which followed four complaints of sexual harassment against him by subordinate employees, was motivated by racial animus.

Hills appeals pro se following defendants' successful motion for summary judgment, arguing he can prove he was discriminated against on account of his race because "other [DGS] employees who were not in a protected class were not

terminated when sexual harassment charges were filed, and proven to be true[,]” but only “received adverse action, [were] demoted, or placed in another agency.” We conclude Hills cannot make out a prima facie case of racial discrimination and shall affirm the judgment.

BACKGROUND

Hills began working for defendants in 2001. He was appointed acting State Printer in February or March 2002.

It is the policy of DGS that sexual harassment is unacceptable and will not be tolerated. DGS supervisors and managers are responsible for maintaining a favorable work environment free from sexual harassment. Hills was aware of this policy.

DGS received four complaints alleging sexual harassment by Hills against subordinates between April 2002 and January 2003. No other employee of the Office of State Publications had ever received four separate complaints of sexual harassment within a single year.

DGS contacted the Attorney General’s office to investigate the complaints and, in January 2003, Hills was placed on administrative leave while the investigation was pending.

J. Clark Kelso, then interim director of DGS, concluded that the complaints against Hills were substantiated, because multiple sexual harassment complaints had been lodged against Hills in a short time. A lawsuit had been filed against Hills by one complainant and DGS, and the results of the Attorney General’s investigation into the complaints supported that

conclusion. Kelso deemed any substantiated complaint of sexual harassment to constitute a failure of proper job performance.

As a result, Kelso concluded that Hills's employment should be terminated, and it was terminated in April 2003. Hills was told that the reason for his termination was the lawsuit initiated by one of the four sexual harassment complainants, and that his conduct was going to cost the state a lot of money.

Hills's Lawsuit

Hills reasoned, to the contrary, that his employment was terminated due to his race. In his administrative complaint, Hills asserted his termination was race-based because "[o]ther non-African-American employees who have also had sexual harassment complaints filed against them and other complaints were not terminated" as he had been.

Thereafter, Hills sued. His pro se complaint states a single cause of action for "race discrimination in violation of Government Code section 12940." It alleges that, during his employment, two subordinate employees "began to express blatant dissatisfaction with having to work under [Hills]" because he is African-American, stated they would not "take orders from any nigger[,]" and referred to an area where Hills worked as "Nigger Alley." After these two subordinate employees learned of Hills's intention to transfer one employee to a lesser position, Hills alleges, they acted with another "'malcontent' employee [to] orchestrate[] a plan" to file false sexual harassment complaints against Hills. Hills alleged he reported that "racist employees were attempting to set him up with false

charges" and demanded DGS's deputy director take action to end the discriminatory environment, but no investigation nor disciplinary action was taken. Moreover, the sexual harassment charges brought against him "proved to be false" in one case, and the others were "similarly unproved or were even recanted."

Defendants moved for summary judgment. They argued Hills was terminated for legitimate, nondiscriminatory reasons and there is no evidence to support Hills's claim his termination was motivated by racial animus. Defendants argued Hills had no personal knowledge of any racially derogatory statements; the reference to "Nigger Alley" was used before Hills began work at DGS, and did not refer to the hallway where Hills's office was located; and Hills never reported these statements to a supervisor or person in authority at DGS, nor indicated he believed he was the subject of racial discrimination.

In his opposition to the motion for summary judgment, Hills argued that he can make out a prima facie case of discrimination because he belongs to a protected class; his job performance was satisfactory; he was discharged without cause; and his position was filled thereafter by someone of lesser qualifications who does not belong to a protected class. Hills submitted a declaration stating that he could prove "that racial discrimination existed at [the Office of State Publication] while [he] was an employee," because another employee had filed a lawsuit for racial discrimination. He also averred that his termination was a pretext for discrimination because he "was not given the opportunity to clear my good name before I was

terminated, while white managers remain employed during and after harassment charges," and he "began to report disturbing racial comments as soon as I was made aware of their existence."¹ Hills's declarations were the only ones submitted in opposition to the motion for summary judgment.

Defendants moved to strike Hills's declarations, and raised 58 individual objections to their contents and to the exhibits thereto on various grounds, including that the statements contained therein lacked foundation and evidentiary support, and were vague, overbroad, conclusory, argumentative, speculative, and irrelevant. The trial court sustained all but six of the 58 objections raised by defendants to Hills's declarations and the exhibits thereto.

The trial court then granted defendants' motion for summary judgment.² The court first noted that Hills's separate statement in opposition to the motion "fails to comply with California Rules of Court, rule 3.1350, in that it fails to state which facts are 'disputed' and fails to set forth admissible evidence in support of each disputed fact. Given the confusing nature of the evidence submitted by [Hills], the failure to properly prepare and present to the court a separate statement that complies with the statutory requirement warrants granting of the

¹ Hills also submitted a second declaration that was more in form of a memorandum of points and authorities, containing headings such as "factual background" and "legal issues."

² There was no request for oral argument.

motion" and the court "exercise[d] its discretion to grant the motion by reason of [Hills'] failure to comply with the separate statement requirement." (Some capitalization omitted.)

On the merits, the court agreed with defendants that Hills cannot establish a prima facie case of racial discrimination because, "[a]lthough he belongs to a protected class, . . . he cannot show that his job performance was satisfactory, as he admits that he was subject to four separate claims of sexual harassment in less than one year," as no other employee of defendants had been. And, even if Hills could establish a prima facie case of discrimination, defendants had a legitimate, non-discriminatory reason for his termination, and the court found Hills had failed to submit admissible evidence to support any inference that it was pretextual. Finally, the court found Hills failed to provide any evidence to support a rational inference that intentional discrimination was the true cause of defendants' actions.

DISCUSSION

I. Standards of Review

A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. We review the trial court's decision de novo, considering all the evidence the parties offered in connection with the motion, except that which the court properly excluded, and the uncontradicted inferences the evidence reasonably supports. In the trial court, once a defendant has shown that one or more elements of the plaintiff's

cause of action cannot be established, the burden shifts to the plaintiff to show the existence of a triable issue. To meet that burden, the plaintiff may not rely upon the mere allegations or denials in his or her pleadings but instead must set forth the specific facts showing that a triable issue of material fact exists as to that cause of action. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

In reviewing a grant of summary judgment, we may consider only those facts that were before the trial court, disregarding any new allegations made for the first time on appeal. Unless they are factually presented, fully developed, and argued to the trial court, potential theories that could theoretically create a triable issue of fact may not be raised for the first time on appeal. (*Ashdown v. Ameron Internat. Corp.* (2000) 83 Cal.App.4th 868, 874.)

Although it is said that our review of a summary judgment is de novo, that does not mean we engage in a "ground-up" analysis of the summary judgment motion independent of the arguments made by the appellant in his opening brief. Even on review of a summary judgment, "[t]he appellant has the burden of showing error occurred." (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1140.) "[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims

are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.) "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as [forfeit]ed." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

Hills is not excused from these requirements because he has represented himself; pro se litigants are not entitled to special treatment and are required to follow the procedural rules that govern civil litigation. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523.) "A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985.)

II. Hills Has Not Shown He Can Prove Racial Discrimination

It is unlawful for an employer to "discharge [a] person from employment" or to "discriminate against the person in compensation or in terms, conditions, or privileges of employment" because of the person's race. (Gov. Code, § 12940, subd. (a).) To prove a prima facie case of employment discrimination, "[g]enerally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he . . . was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination,

. . . and (4) some other circumstance suggests discriminatory motive.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) A defendant employer may obtain summary judgment in two ways: by presenting admissible evidence that one or more of plaintiff’s prima facie elements is lacking, or that the adverse employment action was based on a legitimate, nondiscriminatory reason. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.)

“[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer’s stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.” (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005.)

We conclude from the record that defendants, as the moving parties, met their threshold burden of proving that Hills cannot establish a prima facie case of racial discrimination because he cannot show one of the four elements of that claim: i.e., that his job performance was satisfactory. (See *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 355; *Caldwell v. Paramount Unified School Dist.*, *supra*, 41 Cal.App.4th at p. 203.) The undisputed facts established that, prior to beginning work, Hills understood that defendants had a policy against sexual harassment in the workplace. Hills also knew that defendants held supervisors (including Hills) responsible for

maintaining a favorable working atmosphere free from sexual harassment for all employees. He received sexual harassment prevention training shortly after beginning his employment.

Defendants also showed it was undisputed that there were four separate sexual harassment complaints filed against Hills in less than a year, and that one of the complaints gave rise to a lawsuit. The multiple complaints were independently investigated and deemed substantiated. The interim director of DGS deemed "any substantiated complaint of sexual harassment by an at will employee as being, among other things, a failure to perform job responsibilities in a satisfactory manner and engaging in behavior that subjected the Department to potential liability." He also averred that "[t]he decision to terminate [plaintiff's] employment was in no way related to his race. Rather, his termination was based solely upon the multiple serious complaints filed against him in such a short time, and the results of the investigation into those complaints." In light of this evidence, defendants met their burden of showing there was no disputed issue of fact on the question of whether Hills's job performance was satisfactory: it was rendered unsatisfactory by virtue of the sexual harassment complaints against him by female subordinate employees.³

³ This evidence would also have been sufficient to carry defendants' initial burden of showing that Hills's termination was based on legitimate, nondiscriminatory reasons, and to shift the burden to Hills of "offer[ing] substantial evidence that [defendants'] stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence [defendants] acted

As we have noted, the trial court sustained 52 of the Department's 58 objections to Hills's evidence. In his brief in this court, Hills does not argue that those evidentiary rulings were erroneous; hence, we assume the rulings were correct. (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1015.)

In his brief on appeal, Hills insists (without reference to evidence in the record), "I will be able to establish that (1) I belong to a protected class; (2) my job performance was satisfactory; (3) I was discharged without cause; and (4) my job was not filled by an individual of comparable qualifications who was in the protected class." As to requirement of satisfactory job performance, Hills states he "will prove" that his job performance was satisfactory, and "the fact that four separate sexual harassment complaints were lodged against me in the space of less than one year does not mean that they are true and valid complaints."

But, on appeal from a successful summary judgment motion, Hills must point to substantial evidence in the record that would support a reasonable inference having four sexual harassment complaints against him by female subordinate employees within a year investigated and deemed substantiated could nonetheless constitute satisfactory job performance. (See

with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude [defendants] engaged in intentional discrimination." (*Hersant v. Department of Social Services, supra*, 57 Cal.App.4th at pp. 1004-1005.)

Merrill v. Navegar, Inc., supra, 26 Cal.4th at p. 477.) He makes no attempt to do so.

Instead, Hills leaps over the challenge to his ability to establish a prima facie case of racial discrimination and instead attempts to show defendants' discriminatory animus by arguing that "other [DGS] employees who were not in a protected class were not terminated when sexual harassment charges were filed, and proven to be true[,] but only "received adverse action, [were] demoted, or placed in another agency." (Cf. *Hersant v. Department of Social Services, supra*, 57 Cal.App.4th at p. 1005.)

But on appeal Hills must point to *substantial* evidence in the record that would support a reasonable inference defendants fired him because of his race, rather than his behavior. (*Hersant v. Department of Social Services, supra*, 57 Cal.App.4th at pp. 1004-1005.) He has failed to do so. Indeed, Hills cannot demonstrate the existence of other similarly-situated non-African-American supervisor employees who received different or superior treatment: it is undisputed that no other employee ever accumulated **four** sexual harassment complaints in less than a year, which were "proven to be true[.]"

For these reasons, we conclude the trial court did not err in granting summary judgment in favor of the defendants on Hills's complaint for racial discrimination.

DISPOSITION

The judgment is affirmed. The Department of General Services shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

SIMS, J.

We concur:

SCOTLAND, P. J.

NICHOLSON, J.